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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 897

MICHOUD INDUSTRIAL FACILITIES AND BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS, ET AL,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Board of Commissioners of the Port of New Orleans (a State of Louisiana Agency), your petitioner, hereinafter sometimes referred to as "Dock Board", prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause on August 22, 1968.

(a) *OPINIONS BELOW*

The United States District Court for the Eastern District of Louisiana rendered no opinions. In its final judgment (R. 651-680 at page 661) the report of the Commission was confirmed, and the report of the Commission and the Charges to the Commission were made, respective-

ly, the findings of fact and conclusions of law of the case.

The opinion of the Court of Appeals (R. 2410) has been reported in 322 F. 2d 698. A copy of said opinion is appended as Appendix A (*Infra* pp. A1-54).

(b) JURISDICTION

(i) The judgment of the Court of Appeals was rendered and entered on the 22nd day of August, 1963. (ii) On motion of petitioner, three successive orders granting petitioner extensions of time within which to file an application for rehearing were signed and filed: August 30, 1963 (R. 2474); September 26, 1963 (R. 2476); November 5, 1963 (R. 2478). The third extension of time expired November 14, 1963. On that day petitioner filed a Petition for Rehearing En Banc or, in the alternative, Petition for Rehearing (R. 2542). A rehearing was denied on December 13, 1963 (R. 2578). (iii) The jurisdiction of this Court is invoked under the provisions of Section 1254 (1) of Title 28, United States Code (28 U.S.C. § 1254 (1)).

(c) QUESTIONS PRESENTED

The questions here presented in this eminent domain case are:

(1) Whether the decision of a Court of Appeals, which holds that the rates of rental received by the owner of property prior to condemnation, by themselves and without consideration of other factors, "absolutely control" and "completely dominate" (both at the time of taking and at a date approximately two years after the taking), the estimate

(i) of the fair market rental value at the time of taking, and

(ii) of the fair market fee value almost two years later,

when a Commission and the District Court, on the basis of conflicting testimony, have found otherwise, does not

(a) nullify the clearly erroneous rule;

(b) establish the Court of Appeals as a fact finding body and a "de novo" reviewer of the case in substituting its conclusions of fact for those of the Commission and the District Court;

(c) conflict with the decisions of this Court and those of other Circuits;

(d) declare as law what in reality are the Court's own conclusions of fact.

(2) Whether this Court should not set aside a decision of a Court of Appeals which is based upon conclusions of fact not substantiated by the record, and which ignores countervailing facts appearing of record.

(3) Whether this Court should not establish rules of review for the Courts of Appeals for their use in considering the reports of a commission and the judgments of a District Court adopting that report, just as this Court has established "guide lines" for a commission and for a District Court in the field of instructions to the commission, the conduct of hearings, the kind of report to be filed, and similar matters.[1]

(4) Whether a decision of the Court of Appeals that Commissioners in fixing just compensation should not consider opinions of experts who do not substantiate their opinions of rentals by exact comparables, which decision is in conflict with the decision of this Court in *U. S. v.*

[1] *U. S. v. Merz* and *2,872.88 Acres, etc. v. U. S.*, Nos. 65 and 79, respectively, October Term, on Writs of Certiorari to the United States Courts of Appeals, 10 and 5 Cir. decided February 24, 1964.

Miller, 317 U.S. 369, 87 Law Ed. 336, and of the Court of Appeals for the 6th Circuit in *Knollman v. U. S.*, 214 F. 2d 106, should not be reviewed in order to establish settled jurisprudence in condemnation cases.

(5) Whether the holding of the Court of Appeals that it was error in condemnation proceedings separately to value the industrial facility and open land adjoining, which decision is in direct conflict with the holdings of Courts of Appeals of other Circuits,[2] should not be reviewed in order to establish settled jurisprudence in condemnation cases.

(6) Whether the decision of the Court of Appeals which is in conflict with the rule that an owner is entitled to have his property valued for its highest and best use, which rule has been established by this Court and various Courts of Appeals,[3] should not be reviewed in order to make the decision of the Court of Appeals conform with settled jurisprudence.

(7) Whether the decision of the Court of Appeals that it was error for Commissioners to determine fair market rental value on the basis of a percentage factor of the fair market fee value of the property, which decision is in conflict with the decision of the Court of Appeals for the 8th Circuit in *Kimball Laundry Co. v. U. S.*, 166 F. 2d 856, should not be reviewed in order to establish settled jurisprudence in condemnation cases.

(8) Whether the decision of the District Court, affirmed by the Court of Appeals, in effect granting the

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[2] *U. S. v. City of New York*, Ct. Ap., 2nd Cir., 1948, 165 F. 2d 526; *Cade v. U. S.*, Ct. Ap. 4th Cir., 213 F. 2d 138; *National Brick Co. v. U. S.*, Ct. Ap. for the District of Columbia, 1942, 131 F. 2d 30.

[3] *Olson v. U. S.*, 292 U.S. 246, 78 L. Ed. 1236; *McCandless v. U. S.*, 298 U.S. 342, 80 L. Ed. 1205, 56 S. Ct., 240; *U. S. v. Waterce Power Co.*, Ct. Ap., 4th Cir., 220 F. 2d 226.

United States 6% interest on an obligation providing for no interest, does not deprive the owner of the "full and perfect equivalent" to which it is entitled under the Constitution, the statute and the jurisprudence.[4]

(d) *STATUTES INVOLVED*

Under Point I, Rules 52(a), 53(e)(II) and 71A(h) are set out in Appendix C.

Under Point VI, the Fifth Amendment to the United States Constitution; Section 258(a) of Title 40, United States Code; and Articles 3186 and 3249(1) of the Louisiana Civil Code, are set out in Appendix D.

(e) *STATEMENT*

This is an eminent domain proceeding involving an industrial facility (customarily, and herein, referred as "Michoud Industrial Facilities"), consisting of approximately 1,000 acres of land and a complex of industrial buildings, situated in the eastern area of the City of New Orleans.[5]

The land was originally acquired in 1942 by the United States for shipbuilding purposes, but plans were changed and in January, 1943, the Defense Plant Corporation began the construction thereon of aircraft building facilities which were completed in March, 1944, but

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[4] Fifth Amendment, United States Constitution; 40 U.S.C. 258a; *Miller v. U. S.*, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336; *Seaboard Airline Railway Co. v. U. S.*, 261 U.S. 299, 43 S. Ct. 354, 67 L. Ed. 664.

[5] The advantageous location of the property is fully developed in the Report of the Commission (R. 342-345) including the primary factors that the property was bordered on the south by the Gulf Intracoastal Waterway, on the east by the Michoud Canal, and on the north by United States Highways 90 and 11. Also, the main line of the Louisville & Nashville Railroad passed in immediate proximity with a switch track into the Facility.

The description and history of the property are set forth in the Commission's Report (R. 292) and the Court of Appeals decision (*Infra*, pp. A2-4).

which were never used to any appreciable extent. The plant was thereafter declared surplus.

During 1947 the Government negotiated[6] with petitioner for the sale of the Facilities to petitioner and on November 28, 1947, the United States and Reconstruction Finance Corporation (the latter, the successor in interest to Defense Plant Corporation), both acting through War Assets Administration, sold the facility to the Dock Board for the price of $9,506,941.00, payable out of the rents, revenues, etc., to be derived from the sale or lease of the property for a period of 15 years (R. 2156-2171).

The Dock Board was motivated in acquiring the Michoud Industrial Facilities by its desire to preserve the property as an adjunct to the Port, and, for that purpose, to maintain and develop it as an industrial center by making the facility available for occupancy and use by new businesses and industries which would benefit the City and Port (R. 747). It is obvious that this water frontage for marine terminals would have been a great magnetic attraction for industries, in particular for those the operation of which required close proximity to wharves and dockside warehouses, and even more particularly for those desiring tidewater frontage (2′ to 2½′ tidal rise as opposed to 18′ to 20′ high water rise on the Mississippi River).

Immediately prior to the formal transfer of title, a severe hurricane caused considerable damage to the property, requiring time-consuming and costly rehabilitation

[6] The Government was anxious to dispose of the property. Defense Plant Corporation was paying to the State of Louisiana and to the City of New Orleans approximately $300,000.00 per annum ad valorem taxes on the buildings, and there was some talk of these taxes being increased to $500,000.00 per annum (R. 743, 758). As no use was being made of the property, Defense Plant Corporation was incurring considerable expense for maintenance.

thereof (R. 739-741). In order to protect the property from further tidal water damage (and to assure prospective tenants of such protection), the Dock Board, subsequent to its acquisition of the property, negotiated with the Levee Board of Orleans Parish for the construction of levees, which, however, were not completed until mid 1951 (R. 773) immediately after the taking in this case.

In accordance with the act of sale, on or about May 11, 1948, the War Assets Administration and the Dock Board agreed to a schedule of rentals for the various buildings and lands, which rentals the War Assets Administration described at that time as "substandard". (R. 2140-2156; see in particular p. 2146.) Because of the hurricane damage and of the need to familiarize itself with the property, during the first year of leasing only 6 new tenants were placed in the property by the Dock Board (R. 765-766). Thereafter, through 1949 and to the end of 1950, the Dock Board was successful in placing approximately 30 tenants in approximately 400,000 square feet of the building (an additional 34,476 square feet were leased to Higgins, Inc. as part of the original negotiations with the Government). (See Chart No. 1, R. 598.)

During the period involved, the market demand for industrial properties in the New Orleans area was described as follows:

1948—"dormant" (R. 829), "Not very good" (R. 1119).

1949—"dormant" (R. 828), "poor to fair" (R. 1119).

1950—"changing situation" (R. 829), "good" (R. 1119).

Latter part of
1950—"demand started" (R. 1096, 1119, 1205).

1951—"heavy" (R. 829), "very good" (R. 1119), "active demand" (R. 1205), "tremendous change" (R. 1627).

1952—"heavy" (R. 829), "acute" (R. 1034), "highest demand" (R. 1096), "very good" (R. 1119).

During the latter part of 1950 and early January, 1951, the Dock Board was in contact with several prospective lessees and anticipated leasing the whole unoccupied space of the facility (R. 780-781). On January 10, 1951, the Government via telegraph advised the Dock Board that it wished to revise the rental schedules, and verbally advised that this action was taken because it had a prospect which would take the remaining unoccupied space and by asking for such revision it could "stop (the Dock Board) from leasing the unoccupied portion". (R. 778-781) Thereafter no further leases were made by the Dock Board (R. 778).

On January 18, 1951, the Dock Board was informed by the U. S. Corps of Engineers that it desired to secure the use of the complete property and requested the immediate right of entry to the unoccupied portion of the property. At the further request of the Government, Dock Board representatives met with Government representatives to work out a long term lease of the property, and by April 20, 1951, negotiations for a lease had reached a point where the proposed lease, excepting the rental figure, was agreed upon. (R. 297)

On that date, and without prior notification to the Dock Board (R. 786), the United States filed a complaint in the United States District Court for the Eastern District of Louisiana, New Orleans Division, taking the exclusive use and occupancy of the property for a term of

years ending June 20, 1952, extendable until June 30, 1975 (R. 91).

On February 11, 1952, the Government amended its complaint to take all of the right, title and interest of the various lessees (R. 132).

On June 9, 1952, by motion and order, the exclusive use and occupancy of the Government was extended until June 30, 1953 (R. 147).

On December 23, 1952, the Government again amended its complaint, this time to take all of the right, title and interest of the Dock Board in the Michoud Industrial Facilities (R. 150).

On February 13, 1953, the Government moved for trial by jury (R. 168), which motion was heard March 18, 1953, and denied by the District Court (R. 171), for the reasons set forth in its Findings of Fact and Order (R. 184).

Following submission by the parties of requests for instructions to the Commissioners, on April 29, 1954, the District Court gave Charges to the Commissioners (R. 208), to which charges the parties filed objections. After a further hearing on September 11, 1954 (R. 266), on October 4, 1954 the Court again charged the Commissioners, stating to counsel for the parties: "Gentlemen, just make your objections so that I will have an opportunity to correct them before the Commissioners get too far along in their work." (R. 267-268). Neither the United States nor any other party made any objections to the charges as given, as is revealed by the record. The charges as given covered all aspects of the valuation problem.

Following an initial meeting with counsel on October 4, 1954, the Commissioners viewed the property on October 5, 1954 (R. 269-270). Beginning October 11, 1954, the Commissioners conducted hearings for 70 days, during which time 51 witnesses were heard (from 1 to 15 days each, a total of 7262 pages of testimony), and 367 exhibits, many multi-paged, were received in evidence (R. 270-271).

After filing of briefs and an entire day of argument before the Commission, the case was taken under advisement. Thereafter, the report of the Commission was filed July 21, 1958 (R. 269 et seq.). This report consists of 254 pages wherein the Commission reviewed in detail the proceedings, history of the property, market conditions, highest and best use of the property, testimony of witnesses, approaches to value, presented 8 charts summarizing evidence, and determined the just compensation due to the Dock Board, as follows (R. 594-6):

(a) $104,029.48, for the rent reserved and due to the Dock Board from the lessees as of May 1, 1951;

(b) $2,260,911.00, for the rent due for the use and occupancy of the unleased portion of the property from May 1, 1951 to December 23, 1952;

(c) $14,322,234.00, for the fee simple title of the Dock Board as of December 23, 1952.

On November 7, 1958, the Government filed objections to the Report (R. 606), and, after filing of briefs, the Government's objections were argued before the District Court on September 23, 1959. (R. 641).

On June 20, 1960, the District Court overruled the objections of the Government (R. 642).

On August 17, 1960, the Government filed a motion that the District Court within its final judgment reduce the value of the fee as of December 23, 1952 by the sum of $9,506,941.00 (representing the amount claimed by the Government as due from the Dock Board on the original purchase price) and that interest at the rate of 6% per annum (due as part of just compensation under 40 U.S.C. 258a) accrue only on the difference of $4,815,-292.00 from December 23, 1952. (R. 642) On August 31, 1960, the Government amended the foregoing motion to reduce its claim to $9,389,328.29, (R. 645) which motion was argued on September 6, 1960.

On October 1, 1960, the District Court filed its Final Judgment (R. 651-680) wherein, after review of the proceedings, the District Court confirmed the report of the Commissioners, and ordered that the report of the Commission and the charges to the Commission be made, respectively, the findings of facts and conclusions of law of this case (R. 661). The "just compensation" awarded the Dock Board consisted of the three items above set forth, as awarded by the Commission. The Court further decreed that the Government as "owner by virtue of its vendor's lien" (more properly "vendor's privilege"), would participate in the award of just compensation for the fee simple title, to the extent of its vendor's privilege, $9,389,328.29, and that the difference, $4,932,904.71, together with 6% per annum interest from date of taking to date of payment, be paid to the Dock Board. (R. 669-670).

On December 1, 1960, the United States filed Notice of Appeal (R. 681) and on December 2, 1960, the Dock Board filed Notice of Appeal limited to the interest question (R. 685).

After filing of briefs and argument, the United States Court of Appeals, Fifth Circuit, on August 22, 1963, reversed and remanded the case to the District Court, affirming, however, that part of the District Court's judgment which was the subject of the cross-appeal of the Dock Board. A dissent, with written reasons, was entered by Circuit Judge Brown (*Infra*, pp. A26-54)

On November 14, 1963, the Dock Board filed an Application for Rehearing En Banc, and, in the alternative, Petition for Rehearing, which application was denied on December 13, 1963.

(f) *REASONS FOR GRANTING THE WRIT*

I.

In reversing the decision of the District Court which adopted the findings of the Commission, the Court of Appeals nullified the "clearly erroneous" rule.

Petitioner respectfully submits that the instant decision of the Court of Appeals for the Fifth Circuit appears to be influenced by the tendency of the majority of that Court to feel that all condemnation cases should be tried to a jury. This feeling is evidenced in the instant case by the words of the Chief Judge, as the organ of the majority of the Court, at the end of the majority's opinion, indicating the supposed unreliability of Commissioners.[7]

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[7] *Infra*, pp. A24-26, *citing U. S. v. Leavell & Ponder, Inc.*, 5 Cir. 1961, 286 F. 2d 398, 409, *U. S. v. Frank S. Buhler*, 5 Cir., 1962, 305 F. 2d 319, 331, in both of which cases the Chief Judge was the organ of the Court. Judge Brown thus expresses the thought in his dissenting opinion:

> "Amplifying the strictures voiced in *United States v. Leavell & Ponder, Inc.*, * * * and echoed more recently in the second appeal in *United States v. Buhler* * * * against the use of Commissioners or, for that matter, anything but a jury trial in condemnation cases no matter how complex, the Court's opinion gives the impression of a runaway Commission * * * " (*Infra*, pp. A26-27).

It would be difficult, if not impossible, to find a case more suited than this one for submission to a commission rather than a jury[8] or to find (i) procedures leading up to the commission's report, more completely and carefully followed, or (ii) a commission's report more thoroughly and painstakingly prepared, than is so in the instant case. The check list given in this Court's recent decision in the case of *Merz v. U. S. and 2,872.22 Acres of Land, etc.*[9] may be checked against what was done in the instant case with gratifying results. The procedures followed here and the report filed are concisely described in the dissenting opinion herein.[10]

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[8] The dissenting opinion herein points this out in detail (*Infra*, pp. A27-30) and concludes:

> "This multi-party, multi-issue case, which Government counsel estimated would take 6 to 8 months to try, was not one suited for a jury trial." (*Infra*, p. A29).

[9] Nos. 65 and 79, October Term, 1963, decided February 24, 1964; reported in 32 LW 4165-4167, *supra*.

[10] "The Court appointed a Commission with a New Orleans attorney as its chairman. Numerous pretrial hearings were held. The Court invited suggested charges to be given by the Court to the Commission. These were the subject of extensive comment, criticism, objection and hearing. As its alpha and omega, as its scriptural guide, these are reprinted in the opening pages of the Commission's Report. The trial Judge's order confirming the Report states expressly that 'no exceptions were taken to the charges as finally given by the Court.' The Commission held hearings and took evidence on 70 days. As the Report states, the 'record in this matter consists of 7,262 pages of testimony of fifty-one witnesses, some of whom were examined and cross examined for one to fifteen days, consecutively. * * * '. In addition 367 exhibits were received. Testimony of the principal experts for the claimants (Lemarie, Waguespack, Blum, and Carrere) ran in the neighborhood of 700 pages each. That of the Government experts (Aschaffenburg and Johnson) was even longer. Full briefs were filed and extended arguments were heard by the Commission.

"The Report of the Commission, prepared without haste, reflected the authorship of its attorney-chairman by a style that would do credit to any lawyer, or for that matter any judge. It covers 250 pages of the printed record. It is a model of detailed, non-argumentative and objectively presented discussion of the evidence pro and con, witness by witness, issue by issue. After giving the parties the better part of a year in which thoroughly to brief the matter, Judge Christenberry heard arguments over several days. He overruled the objections of the Government, sustained the Report of the Commission, and entered a final judgment based thereon. * * * " (*Infra*, pp. A29-30).

Judge Christenberry's order made the report of the Commission and the Charges of the Court to the Commission, respectively, "the findings of fact and conclusions of law of this case." (*Infra*, p. A30).

Continued

Under the decisions of this Court, the "clearly erroneous" rule[11] does not allow a court reviewing the decision of a district court which adopts the findings of a commission, to assume the role of factfinder;[12] to conduct a *de novo* review,[13] to disregard the findings of a lower tribunal based upon conflicting evidence;[14] to resolve ambiguities differently,[15] or to create a formula of compensation based upon a contrary view.[16]

The following review of this decision of the Fifth Circuit is intended primarily to convince the Court that if the decision of the Fifth Circuit is allowed to stand, the "clearly erroneous" rule will be a nullity.

a.

Fact Finding by the Fifth Circuit

Even though the "clearly erroneous" rule prohibits a *de novo* review,[17] the opinion of the Court of Appeals in this case evidences the extent to which the majority

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[10] Continued

The following is footnote 2 referred to in the above quoted excerpt:

"[2] Of the seven numbered specifications of errors, plus those running from 2(a) through (y), the Government complains of none save the instruction on original and reproduction costs. This is a matter of no consequence since the Commission's Report expressly rejects this as a basis for the award."

[11] Rules 52 and 53(a)(II), F. R. Civ. P.

[12] *United States v. Oregon State Medical Soc.*, 343 U.S. 326, 331-332, 96 L. Ed. 978, 984, 72 S. Ct. 690.

[13] *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-342, 94 L. Ed. 150, 153, 70 S. Ct. 177 (1949); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 596-597, 95 L. Ed. 1199, 1206, 71 S. Ct. 971; *United States v. Oregon State Medical Soc.*, 343 U.S. 326, 331-332, 96 L. Ed. 978, 984, 72 S. Ct. 690; *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377, 381, 100 L. Ed. 1264, 1273, 76 S. Ct. 994.

[14] *Davis v. Schwartz*, 155 U.S. 631, 636, 39 L. Ed. 289, 293, 15 S. Ct. 237; *Tilghman v. Proctor*, 125 U.S. 136, 149-150, 31 L. Ed. 664, 668, 8 S. Ct. 894.

[15] *United States v. National Asso. R.E.B.*, 339 U.S. 485, 495-496, 94 L. Ed. 1007, 1016, 70 S. Ct. 711; *Guzman v. Pichirilo*, 369 U.S. 698, 702-703; 8 L. Ed. 2d 205, 209-210, 82 S. Ct. 1095.

[16] *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 689, 90 L. Ed. 1515, 1524, 66 S. Ct. 1187.

[17] *United States v. Yellow Cab Company*, 338 U.S. 338, 341-342, 94 L. Ed. 150, 153; *Timken Roller Bearing Co. v. United States*, 341 U.S., 593, 596-7, 95 L. Ed. 1199, 1206; *United States v. Oregon State Med. Soc.*, 343 U.S. 326, 331-2, 96 L. Ed. 978, 984.

of that Court disregarded the findings of the Commission, which were made after consideration had been given to conflicting evidence, and substituted its own view of the facts and determined for itself the weight of the evidence. Judge Brown expressed this thought in the following language of his dissenting opinion:

> "* * * * what the Court is doing is retrying a condemnation case. So long as F. R. Civ. P. 52(a) and 53 stand, that is not our function." (*Infra*, p. A27).
>
> * * * * * *
>
> "Of course, the difficulty in working with the Court's opinion is that it is difficult to ascertain when we are declaring law and when we have taken on the role of persons skilled in the sale, lease, rental, disposition and management of large industrial properties in a major port." (*Infra*, p. A36).
>
> * * * * * *
>
> "I have dwelt on this at length because to me it demonstrates that no matter how much we sugarcoat it, in this reversal this Court is engaging in the process of fact finding. In our remote positions whether in the Courthouse at New Orleans or from our various home environs, we are undertaking to declare as a matter of law that in these opinions these working New Orleans real estate experts simply do not know what they are talking about. To reverse the judgment, we are saying as Judges that no reasonable man could find that waterfront property of the kind available at Michoud does not have the value placed on it by Lemarie or the others. When Courts make such statements, it inevitably means that Judges are here testifying from their own or collective experience * * * " (*Infra*, p. A47).
>
> * * * * * *

> " * * * Fact findings have been made by the body constituted under the rules to determine such a case. There, in the main, it should end. For that is the meaning of clearly erroneous even in condemnation cases." (*Infra*, pp. A-53-54).

To justify its disregard of the "clearly erroneous" rule, the majority opinion of the Court of Appeals opens with a statement that certain "peculiar circumstances" of the case resulted in "underlying legal questions" bearing on the outcome of the appeal. (*Infra*, p. A4). Thereafter, the majority does not refer to "underlying legal problems", but develops those "peculiar circumstances" into conclusions of fact, incorporating therein the Court's view of the testimony and the weight of market factors, disregarding (i) positive testimony in the record and (ii) the findings of the Commission. Those "peculiar circumstances" shall be discussed in the following sections.

1.)

"Peculiar Circumstance" No. 1

Lack of Comparables

The first "peculiar circumstance" noted by the Court of Appeals is that, due to the size of the property and number of improvements thereon, the property " * * * does not really have any comparables in the market on which expert opinions of valuation can be based * * * " (*Infra*, p. A4).

While in later sections hereof, the legal question of admissibility and weight of evidence of "comparables" will be discussed, it is noted here that the Commissioners recognized the foregoing problem of valuation referred to by the Court of Appeals, in the following language:

> "Because of the nature, character and size of the property in suit and the non-existence of any

other property in the area bearing greater likeness or similarity to that in suit than those involved in the cited sales and leases of other properties, it is understandable that the appraisers had to resort to the cited sales and leases for market data. They have undoubtedly produced what their judgment dictated was the best data available under the circumstances which, we believe, demanded that greater latitude, than normally allowed, be permitted in the introduction of such market data.

"Needless to say, we cannot and do not predicate any findings or conclusions of value, or awards of just compensation solely on any individual sale or lease cited. We do not regard the evidence of market data conclusive or in itself determinative of the issues of value herein. Such evidence of that data as we have given weight, viewed in the light of the whole body of the evidence, has, however, furnished us with some indication of the values to be determined." (R. 501-502.)

2.)

"Peculiar Circumstance" No. 2

Reproduction Costs

The Court of Appeals finds that due to the size and nature of improvements, the reproduction cost method "* * * cannot be used as an aid to valuation * * *" (*Infra*, p. A4). In so concluding, the Court of Appeals did not differ from the findings of the Commission, as follows:

"The fact that the facility, as it existed on May 1, 1951, had not been recently constructed and there having been no showing that it was reasonably likely that it would be reproduced further leads us to conclude that reproduction cost, less depreciation, would not, **with reasonable accuracy,**

reflect fair market value here * * * *". (R. 507-508, emphasis supplied.)

3.)

"Peculiar Circumstance" No. 3

Lack of Rentals Indicating Lack of Demand and Rental Possibilities

Under this "peculiar circumstance" the Court of Appeals included several "facts" from which it developed several conclusions.

The Court first states that within a "few months" of the date of taking (of the temporary use and occupancy), April 20, 1951, there were approximately 1,767,000 square feet of unoccupied space being offered by the Dock Board for long term leases at 20 cents per square foot, and more than 700 acres of "raw" land being offered at $200 to $300 per acre. (*Infra*, p. A4)

From this the Court concluded:

(a) that the lack of leasing " * * * is so indicative of the lack of demand and the lack of rental possibilities as to completely dominate, if not absolutely control, the income factor in any capitalization formula for arriving at the fair market value of the property as of May 1, 1951 * * *" (*Infra*, p. A4); and

(b) that " * * * there is also the fact that on December 23, 1952, any hypothesis dealing with an assumption that there would be a purchaser ready, willing and able to buy from a seller, ready, willing and able to sell, must include the fact that these buildings with 1,767,000 square feet of floor space would hang over the New Orleans market for similar factory and warehouse space to such a degree that it must also be considered to have a

dominating, if not an absolutely controlling, place in determining the market value of the fee as of that date on any valuation based on capitalization of income." (*Infra*, pp. A4-5).

This conclusion was somewhat amplified by the majority as follows:

> " • • • We do hold, however, that the Commissioners erred in not considering as one of the most important elements of the value as of the date of December 23, 1952, the fact that a hypothetical purchaser and seller would arrive at a price which would be **largely controlled by the fact that the purchaser's return on his investment would depend on his being able to rent it on a market which, less than two years previously, had been unable to absorb a large part of it at a rental of approximately 20 cents per square foot.**" (*Infra*, p. A10. Emphasis by the Court).

An examination of the record will reveal the correct history of the property and the efforts of the Dock Board to lease same; a history considered at length by the Commissioners, and, a history disregarded in the majority opinion of the Court of Appeals. Basically what that Court has done is to make an assumption of fact by ignoring other facts in the record and the law of the case as expressed in the District Court's charges. In particular, the record shows that:

a.) Immediately prior to the acquisition by the Dock Board of the property on November 28, 1947, the property had been extensively damaged by a hurricane resulting in a costly and time-consuming rehabilitation. (R. 739-741)

b.) The hurricane evidenced the necessity for levees

to protect the property from further damage by tidal waters and to assure prospective lessees of such protection. The Dock Board negotiated with the Levee Board of Orleans Parish for construction of such levees, which, however, were not completed until mid-1951 (immediately following the institution of these proceedings). (R. 773) Concern over the absence of protective levees may be noted in an undistributed Dock Board brochure, dated October 1, 1950 (Exhibits G.-6, R. 2346), wherein it was stated: "Approved for immediate construction is an 8 foot levee which will surround the entire plant."

c.) During the first year, only 6 lessees were placed in the property, because, in the words of the witness, " * * * we were very busy trying to get our property in presentable condition * * * ". (R. 765-766)

d.) During the time that the Dock Board sought lessees for the property, it did not give an exclusive listing of the property to any realtor, with the result that no realtor bothered to put much work in the securing of sales or leases. (R. 1211, 835)

e.) The rentals for the property were not negotiated (See for examples, R. 1541-1542, R. 2015-2016) but were published by the Dock Board, a public agency, during a dormant market for industrial property (see *infra*) and for the recognized purpose of attracting industry to the New Orleans area. (R. 747) The Dock Board deemed its primary task to be to attract industry and commerce to New Orleans, to fill up this facility, and it adhered to its bargain basement rent schedule for that purpose.

f.) The testimony of experts clearly revealed that the demand for industrial properties in the New Orleans market was dormant from 1947 until late 1950 (R. 828,

829, 1119) after which it became active (R. 1096, 1119, 1205) and increased greatly through 1952. (R. 829, 1034, 1096, 1119, 1627 and 1205)

g.) In the latter part of 1950, and early January, 1951, the Dock Board was in contact with several prospective lessees and anticipated full leasing of the facility (R. 781), when the Government on January 10, 1951,[18] requested that the Dock Board cease further efforts to lease the property " * * * because this office (General Services Administration) has a prospect which will take all of the remaining unoccupied space at Michoud." (R. 780) Thereafter, and until April 20, 1951, (or for more than 3 months) when the Government instituted these proceedings by condemning a temporary use of the property, the Dock Board made no further efforts to lease the property. (R. 776)

The Commissioners fully analyzed all of the factors involved (R. 499-501) and concluded: " * * * And we believe the record herein supports their (Dock Board expert witnesses) opinions that these rentals are not indicative of and do not represent the fair market rental value of the property at the critical dates involved here." (R. 501)

Contrary to the testimony of experts with reference to market demand, contrary to the undisputed testimony of a witness that the Dock Board, due to contacts with prospective lessees, anticipated full occupancy, and contrary to the findings of the Commission based upon conflicting testimony, the Fifth Circuit held that the lack of leasing of the facility " * * * is so indicative of the lack of demand and the lack of rental possibilities as to completely dominate, if not absolutely control, the income

[18] The Court of Appeals erroneously refers to January 15, 1951.

factor in any capitalization formula for arriving at the fair market value of the property as of May 1, 1951 * * * " (*Infra*, p. A4). There is evident error here in the Court's appreciation of the problem before it. The taking of May 1, 1951 was not that of the "fee" but only a "temporary exclusive use", and thus no "capitalization formula" was involved; but only the fair market rental value of the property. The fair market rental value to be used in the capitalization formula for arriving at the fee value as of December 23, 1952, was the rental value as of that date,[19] and not as of May 1, 1951.

And, contrary to the instructions of the District Court to the Commissioners that in determining just compensation they could consider " * * * rentals for comparable property in the New Orleans area * * * ",[20] the Court of Appeals ruled that the rental rates published by the Dock Board in May 1, 1950 " * * * would therefore be the best proof of the going market value as of the time the last leases were made in January." (*Infra*, p. A9) In so doing, the Court of Appeals disregards the fact that the critical date for determining the fair market rental value of the property, was May 1, 1951, and not " * * * as of the time the last leases were made in January." And it further disregards the specific instruction of the District Court to the Commission[21] that:

> " * * * In considering rentals obtained by the Dock Board for property leased at Michoud facilities, you are also entitled to give consideration to the (a) special circumstances affecting this property, such as the (b) availability of comparable space as of the date of taking, (c) factors

[19] See Com. Report R. 526.

[20] Instruction XXX (R. 287); as noted by Judge Brown, the Government acquiesced in this charge. (*Infra*, p. A35).

[21] Instruction XXX (R. 287). As noted before, the Government acquiesced in this charge.

> which might have influenced the Dock Board in making these leases, (d) which would not be present in the case of other landlords on the open market, and (e) other special circumstances which might pertain."[22]

As aptly noted by Judge Brown, "The rules are changed after the game is over." (*Infra*, p. A35) With respect to the Government's theory that "existing rentals control," and the majority opinion that the experts and the Commission had ignored it, Judge Brown concluded:

> "The Commission, from the running, ceaseless advocacy of the parties, the examination, re-examination, cross examination, recross examination and swabbing of all of the witnesses through hours and days of endless testimony, was thoroughly familiar with the Government's main theme. The Commission did not 'ignore' it. **It was weighed and found wanting.**
>
> "I for one do not claim to know enough about New Orleans industrial property to declare, with the full weight of law behind it, that no reasonable person could have so concluded." (*Infra*, p. A38, emphasis supplied)

It is evident from the majority opinion of the Court of Appeals, from the dissenting opinion of Judge Brown, and from the record, that with respect to the valuation of the May 1, 1951 taking (temporary use), the Court of Appeals disregarded the evidence in the record, and the findings of the Commission based upon conflicting evidence; and, assuming the role of realty experts, on the basis of this "peculiar circumstance", found, as a matter **of fact,** contrary to expert testimony, that as of May 1, 1951, there was "lack of demand and lack of rental possibilities for the property"; from which assumption the

[22] Letters in parentheses added.

Court concluded that the rental schedule published in May, 1950, was the "best proof" of the market rental value in May, 1951. The Court of Appeals picked one factor, out of the many appearing of record, upon which to base its conclusion.

Such a *de novo* review by a tribunal which apparently dedicated its task to the role of fact finder is directly *contra* to the prohibitions of the "clearly erroneous" rule.

b.

Other Conclusions Arrived at by the Majority of the Court of Appeals

As noted before, the first "peculiar circumstance" referred to by the majority opinion, was the fact that due to its size and number of improvements, the property " * * * does not really have any comparables in the market on which expert opinions of valuations can be based * * * " (*Infra*, p. A4); and that this problem of the lack of comparables was noted by the Commissioners. (R. 501-502, *supra*, p. 16)

In a later section of the opinion, the majority of the Court of Appeals concluded that the only basis for the valuations placed by the Dock Board experts on the "open" or "excess" land (707 acres), was their comparison of the property to sales of small tracts on the Harvey Canal. (*Infra*, p. A15) In particular, the Court of Appeals holds that the Commissioners relied solely upon the testimony of Lemarie " * * * who stated that he was basing it on comparisons with property sold on the Harvey Industrial (*sic*) Canal * * * " The majority then holds, without discussion, that the Harvey properties could not be compared to the Michoud property because " * * * neither by location nor quantity of land involved or other characteristics

(do these properties) bear any resemblance to each other in the market."[23] (*Infra*, pp. A15-16)

An examination of the record reveals:

a.) that Lemarie specifically testified that he did not take any particular property into consideration (R. 1180);

b.) that he testified that he considered properties comparable in certain respects, including Harvey Canal properties, Industrial Canal properties, a tract neighboring the Michoud facility, sales to Valite Corporation, Mississippi River properties, railroad properties, and "* * * a great many more properties * * *" (R. 1110), including tracts up to 140 acres in size, and from $1,320.00 to $15,000.00 per acre in price (R. 604), but, in final analysis used his experience, knowledge and reasonable judgment (R. 1180) in presenting his opinion ("informed guess") that the excess land was worth $6,243,010 as of December 23, 1952; and

c.) that the Commissioners reported that they "* * * cannot and do not predicate any findings or conclusions of value, or awards * * * solely on any sale or lease cited. We do not regard the evidence of market data conclusive or in itself determinative of the issues of value herein. Such evidence of that data as we have given weight, viewed in the light of the whole body of the evidence, has, however, furnished us with some indication of the

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[23] This holding receives separate treatment in Point III hereof, *infra*, p. 29.

The majority opinion surprisingly takes exception to the real estate experts' references to valuation on a square foot basis and says:

"No witness testified that it was customary or usual in the New Orleans market to buy or sell any substantial acreage on a square foot basis." (*Infra*, p. A16).

As a matter of fact the witness Waguespack testified (R. 911):

"* * * More or less, industrial property is sold on a square foot basis, therefore, I have used the square foot."

values to be determined." (R. 502). And, in the same light, the Commissioners predicated their adoption of Lemarie's per acre land valuations on their statement that they "* * * believe the evidence fairly sustains those valuations * * *" (R. 524)

Thus, in holding that the Commissioners erred in this respect, the majority of the Court of Appeals concluded that Lemarie relied solely upon sales of Harvey Canal properties (which is contrary to his testimony) and concluded that the Commissioners relied solely upon Lemarie's opinion (which is contrary to their Report). As noted by Judge Brown: "With all deference, these conclusions (by the majority) are not supported by the record * * *" (*Infra*, p. A41)

The record further reveals that the Dock Board experts testified that they could have sold the "open" or "excess" land within a reasonable time (See, for example, R. 1225) for:

A.) $7,559,228.00 (Waguespack, R. 382);

B.) $6,243,010.00 (Lemarie, R. 396); and

C.) $6,500,000.00 (Blum and Carrere, R. 411).

Government witnesses[24] valued the "excess" or "open" land at:

A.) $2,346,000.00 (Aschaffenberg, R. 426); and

B.) $2,305,697.00 (Johnson, R. 453).

The Commissioners found the value of the open or excess land to be $5,938,142.00 (R. 524), which "finding is within the range of the credited testimony and cannot

[24] The qualifications of these Government witnesses as experts were severely challenged and found wanting by the Commission (R. 361-2).

be reversed unless clearly erroneous".[25]

Indeed, the majority of the Court of Appeals did not hold that finding to be clearly erroneous, but, disregarding the evidence, holds " * * * that the Dock Board did not carry its burden of establishing what the true value is * * * ". (*Infra*, p. A16) In so doing, the Court not only disregards its own prior holdings that in such cases the **appellant** has the **heavy** burden of proving that the awards were "clearly erroneous",[26] but also places upon the Dock Board a burden of proof inconsistent with that charged to the Commission by the District Court within Instruction V (R. 277), to which instruction no objection has been presented by the Government. That charge does provide that defendants (the Dock Board) have the burden of proof, yet, the "preponderance of evidence" required is "simply evidence which is of greater weight, or more convincing, than that which is offered in opposition to it," and the Court of Appeals cannot substitute its opinion in this respect for that of the Commission and the District Court.

It is apparent from their Report that the Commissioners carefully weighed **all** of the evidence with regard to the valuation of the open or excess land; it is apparent from their statements that they did not predicate their opinion upon one type of property or upon the opinion of one expert; it is apparent that their finding was within the range of the credited testimony; and, it is apparent that the majority of the Court of Appeals disregarded the evidence, established a burden of proof upon petitioner contrary to that instructed by the District Court, and

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[25] *United States v. Jones Beach State Parkway Authority*, 2 Cir., 1958, 255 F. 2d 329, 333, *cert. denied* 358 U.S. 382, 3 L. Ed. 2d 71; *Buena Vista Homes Inc. v. United States*, 10 Cir., 1960, 281 F. 2d 476, 480.

[26] *Seale v. United States*, 5 Cir., 243 F. 2d 145 (1957); *Parks v. United States*, 5 Cir., 293 F. 2d 482 (1961).

upset the findings of the Commission simply on the basis of its view of the evidence.

It is submitted that the Court of Appeals, Fifth Circuit, in reversing the decision of the District Court which adopted the findings by the Commission of just compensation, engaged in a *de novo* review, assumed the role of fact finder, disregarded the evidence and the findings of the Commission based upon conflicting evidence, and established a formula of compensation based upon a contrary view of the evidence, and, in so doing, violated the "clearly erroneous" rule and denied petitioner the just compensation to which it is entitled under the Fifth Amendment.

II.

Circuits other than the Fifth have held that the amount of rental received by a landowner prior to condemnation does not "absolutely control" or "completely dominate" the fair market value of property.

The foregoing proposition has been decided by the First,[27] Second,[28] and Eighth[29] Circuits. In the present decision, the Fifth Circuit has held otherwise (*Infra*, pp. A5, A10, A11, A17). Inasmuch as a conflict exists between the Courts of Appeals for the various Circuits, and as the question is daily becoming more important due to the increasing number of industrial-rental properties, it should be settled by this Court. (Rule 19 (c), Rules of S. Ct.)

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[27] *Silventes v. United States*, 168 F. 2d 264, 266 (1948).

[28] *Westchester County Park Commission v. United States*, 143 F. 2d 688, 693 (1944).

[29] *Chicago, B & O Railroad Co. v. North Kansas City Development Co.*, 134 F. 2d 142, 152 (8 Cir., 1943).

III.

In proceedings where the fair market value is to be determined, and where it is generally accepted that no sales of exactly comparable property are available, may the determiner of fair market value give consideration and weight to the opinions of experts who substantiate their opinions of value by references to sales of property similar in some, but dissimilar in other, respects?

The Fifth Circuit has answered the foregoing question in the negative, and in so doing established a rule in conflict with its own prior decisions;[30] as well as in conflict with the decisions of this Court.[31]

Judge Brown correctly pointed out the error of the majority, both in its conclusion that the Commissioners based their findings of value upon particular types of properties (*Infra*, p. A41. See *supra*, Section Ib., p. 26), and the error of the law applied by the majority (*Infra*, pp. A41-48):

> "With all deference, these conclusions are not supported by the record, and the legal declaration is in error. In condemnation cases evidence of sales of other properties is admissible for either one or both of two purposes; (1) To establish an actual going market for sales of like property which then becomes the best (if not the only) measure of just compensation; (2) as tangible evidence of one of the many factors leading a skilled expert to reach a conclusion on value where there is no going market. * * *" (*Infra*, pp. A41-42)

In a recent decision (*United States v. Featherston*, 325 F. 2d 539 (1963)) and in response to Government arguments,

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[30] *Atlantic Coast Line R. Co. v. United States*, 132 F. 2d 959 (1943); *International Paper Company v. United States*, 227 F. 2d 201, 208-9 (1955).

[31] *Montana Railway Co. v. Warren*, 137 U.S. 348, 353-354, 11 S. Ct. 96, 97, 34 L. Ed. 681, 683.

the Tenth Circuit applied the recognized rule stated by Judge Brown.

The majority of the Court of Appeals has held that because of dissimilarities in size and location between Michoud and Harvey Canal lands, they are not comparable. With respect to "location", the decision of the Fifth Circuit is in direct conflict with that of the Sixth Circuit in *Knollman v. United States*, 214 F. 2d 106, 108-109 (1954).

With respect to "size", the Court of Appeals disregards entirely the fact that the Michoud property was compared to the Harvey property because both were industrial properties located on a tidewater canal and, as admitted even by a Government witness, the Michoud property as of December 23, 1952 was the only property in the area that was high, dry, filled and drained **and fronting on a tidewater channel,** and available for sale or lease (R. 1391, 1393, 1447-1448). The importance to industry seeking locations in the New Orleans area, of land of this description is fully substantiated by the record (R. 1529, 912, 981-982, 1047-8, 1122-3).

In answering the foregoing question in the negative, not only did the majority of the Court of Appeals commit the errors pointed out by Judge Brown, but, also:

1) simply adopted the opinions of Government witnesses (whose qualifications were severely challenged and found wanting by the Commissioners) that the properties were not comparable (Cf. *Benedict v. United States*, 270 Fed. 267, 269 (1920)); and

2) disregarded entirely the use of expert opinion testimony in condemnation proceedings. This Court was

eminently correct in stating that in cases similar to the present, the valuation of land is little more than "a guess by informed persons".[32] Such was obvious to one Government witness who testified that " * * * about 25% of the appraisal business is experience and 25% theory and 50% of it common sense, maybe 51% of it common sense." (R. 1607)

Yet, the Fifth Circuit has now established a rule of law that a determiner of just compensation may only rely upon or give weight to the opinions of experts who substantiate their opinions by reference to sales of property exactly comparable in size, location, situation, development, use, etc., even though it recognizes that no such comparable exists.

IV.

Where property condemned consists of a large tract of land consisting of:

a) an industrial facility located and situated upon a particular part of that tract; and

b) "open" or "excess" land which is not essential for the industrial facility, and consisting of lands of different situations (i.e., lands bordering on canals, lands bordering on highways, lands bordering on railroads); under the "unit rule" of valuation, is it error for the determiner of just compensation to determine the value of (a) and (b) separately?

The Fifth Circuit has answered the foregoing question in the affirmative (*Infra*, pp. A13, 16-17), which holding is contrary to the decisions of the Second[33] and

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[32] *United States v. Miller*, 317 U.S. 369, 375, 63 S. Ct. 276, 87 L. Ed. 336, 343 (1943); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6, 69 S. Ct. 1434, 93 L. Ed. 1765, 1772.

[33] *U. S. v. City of New York*, 1948, 165 F. 2d 520, 528-9.

Fourth[34] Circuits, and the Court of Appeals for the District of Columbia,[35] and is contrary to the rule established by this Court that an owner of land is entitled to have the value of his land considered in accordance with its highest and best use.[36]

The Fifth Circuit has held that it was erroneous for the Commissioners to determine separately the fair market value (both rental and fee) of the industrial facility and the 168.78 acres of land attributable thereto, and the 707.68 acres of "open" or "excess" acres; despite the facts that:

1.) the Government made no specification of error in this regard, and, indeed,

2.) if the Commissioners erred in this respect, that error was committed by Government witnesses whose testimony clearly revealed that they considered it proper, if not necessary, to value separately these two units of the property (see Record, pp. 2361 (Appraisal Brochure of Aschaffenburg) and 2370 (Appraisal Brochure of Johnson)).

The so called "unit rule" of valuation was clearly defined by Judge Learned Hand as follows:

> " * * * One of these situations has been when a parcel or plot of land has been improved, and when—as is substantially always the case—it is impossible to separate the improvements so as to transfer them independently. In such situations the only exchangeable property is the union of 'site' and improvement; and this, being indissoluble for purposes of transfer, must be valued as

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[34] *Cade v. U. S.*, 213 F. 2d 138.
[35] *National Brick Co. v. U. S.*, 131 F. 2d 30, (1942).
[36] *McCandless v. U. S.*, 298 U.S. 342, 56 S. Ct. 764, 80 L. Ed. 1205.

> one. The argument runs that, because of this it is erroneous as matter of law ever to add together a supposititious 'site' value and a supposititious improvement value. The argument, so put, is undoubtedly a highly important caution, when the attempt is made to appraise improved land by a process of cumulation; **but we question whether it has any further office than to keep before the tribunal the only relevant objective: the exchange value of the newly emerged unit * * * "** (*U. S. v. City of New York, supra*, 165 F. 2d 526, at p. 528, emphasis supplied.)

Not only is the decision of the Fifth Circuit directly contrary to the foregoing decision, but constitutes an extension of the so called "unit rule" inasmuch as the Fifth Circuit has now held that **unimproved property** must be valued "as a unit" with **improved property.**

Such a rule was found to be completely illogical by Judge Brown (*Infra*, pp. A48-49) who concluded:

> "The quest for the hypothetical seller meeting the hypothetical buyer negotiating on a hypothetical sale which would never in fact be made has not yet reduced the Fifth Amendment to any such absurdity."

V.

Is it error for a commission to determine fair market rental value on the basis of a percentage factor of the fair market fee value of property?

The foregoing question has been answered in the affirmative by the Fifth Circuit (*Infra*, p. A17), which ruling is contrary to the decision of the Eighth Circuit in *Kimball Laundry Co. v. United States*, 166 F. 2d 856, 859-860 (1943), affirmed in this respect by this Court, 338 U.S. 1, 7-8, 69 S. Ct. 1434, 93 L. Ed. 1765, 1773 (1948).

The Commissioners found (R. 538):

> "We think the record supports the view that the fair market rental value of the unleased land, as of May 1, 1951, may be fairly determined on the basis of an 8% gross return on the fair market value of the land at that date. In determining that rental value, we have concluded that the fair market value of the land at May 1, 1951 was 10% less than we have concluded it was at December 23, 1952."

The majority of the Court of Appeals held (*Infra*, p. A17):

> "Moreover, the method of appraising the value of the rental on the vacant land from May 1 (1951) to December 23 (1952) is clearly erroneous. * * * It is difficult to understand where the Commissioners found the authority for assuming a rental value of land based on their conception of what the land was worth. This is the reverse of the usual process of ascertaining the value of land by capitalizing its rental potential * * * " (Dates in parentheses added.)

An examination of the *Kimball* case shows without question that the method of ascertaining rental value by a fraction or percentage factor of the value of property, is not only a "usual process" but one advocated by the Government in the *Kimball* case as a proper basis or method of valuation (166 F. 2d at p. 859). Indeed, in the present case, one Government witness, Aschaffenburg, used this method to determine the rental value of land by applying a 6% net (8% gross) return percentage to his value of "concept of worth" of land. (R. 430)

VI.

The ruling of the Court of Appeals that a condemnor to whom the condemnee is obligated and which obligation is not due but is secured by the property condemned, may cause the reduction of fair market value by the amount of that indebtedness, and, in effect, is entitled to 6% per annum interest on an obligation bearing no interest, is novel to federal condemnation law, contrary to applicable state law, and has the effect of depriving the condemnee of the due process and just compensation required by the Fifth Amendment.

Under the terms of the Act of Sale whereby the Dock Board acquired the Michoud Industrial Facilities, the Dock Board was obligated to pay to the United States a total consideration of $9,506,941.00 payable out of the net rents, revenues, profits, etc., received by the Dock Board from the sale or lease of the facility for a period of 15 years (or until November 28, 1962).[36a] There is no dispute that on December 23, 1952, when the Government expropriated the fee simple title, the Dock Board had not paid the full $9,506,941.00.

After the District Court overruled the Government's objections to the Commissioners' Report, the United States by motion[37] requested that the fair market fee value of the property as of December 23, 1952 be reduced by the full amount of the purchase price. When the Dock Board opposed the motion and, in particular, pointed out that a credit on the purchase price would have to be given for at least one amount, the Government amended its motion to reduce its claim by that amount ($117,612.71).[38]

[36a] R. 2156.
[37] R. 642.
[38] R. 645.

It was the position of the Dock Board before the lower courts that:

(a) as a condemnor, the Government could not alter its position in the condemnation proceedings proper by filing a motion in the nature of a set-off or counterclaim to reduce fair market value;[39] and

(b) in accordance with the Fifth Amendment, the decisions of this Court and 40 U.S.C. § 258a, the District Court had the duty to determine an award of just compensation in the amount of the fair market value of $14,322,234.00 plus the additional element of just compensation measured in terms of reasonable interest (6% per annum under 40 U.S.C. 258a); and that, after the District Court determined the proper award of just compensation, the Government, as a secured creditor, would be entitled to payment of the purchase price due from that award.

By its affirmance of the decision of the District Court, the Court of Appeals, Fifth Circuit, has established as a rule of law that a condemnor to whom the condemnee is obligated and which obligation is secured by the property condemned, is authorized in the condemnation proceedings proper to cause the reduction of fair market value by the amount of that indebtedness, and, in effect, is entitled to receive 6% per annum interest on an obligation bearing no interest. Such a ruling is novel to federal condemnation law, is contrary to state law, and has the effect of depriving the condemnee of due proces and just compensation. In addition, in view of the number and extent of claims of the Government against private property, this

[39] A condemnation proceedings is an *in rem* proceedings, thus the Government may not alter its position to become a condemnor-claimant; see *United States v. Tract of Land in City of Chicago*, 110 F. Supp. 9, 11 (U.S.D.C., E.D. Ill., 1953).

issue is of great importance in federal condemnation law and should be settled by this Court.[40]

This Court has ruled on many occasions that the "just compensation" required by the Fifth Amendment includes not only the value of the property at date of taking, but also an additional element of compensation measured in terms of reasonable interest from date of taking to date of payment.[41] In the same respect, this Court has ruled that the owner **at the time of taking**, not the owner at an earlier date, is entitled to just compensation.[42]

Thus, in order to reduce the fair market value of the property by the purchase price, the District Court was forced to decree that by virtue of its "vendor's lien," the Government was an "owner" and entitled to "share" in the award of just compensation. In so doing, the District Court rendered as synonymous the two terms "ownership" and "vendor's lien", despite the fact that:

1.) the act of sale (R. 2156 et seq.) evidences in itself a complete disvestiture of title by the United States

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[40] For example, questions with reference to the nature and effect of federal tax liens in consideration of local concepts of property rights, are frequently presented to this Court for determination. See *United States v. Brosnan*, 363 U.S. 237, 241-242, 4 L. Ed. 2d 1192, 1196, 80 S. Ct. 1108 (1960); *United States v. Bess*, 357 U.S. 51, 2 L. Ed. 2d 1135, 78 S. Ct. 1054 (1958).

[41] *United States v. Rogers*, 255 U.S. 163, 65 L. Ed. 566-569 (1921); *Seaboard Airline R. Co. v. United States*, 261 U.S. 299, 67 L. Ed. 664 (1923); *Liggett & Meyers Tobacco Co. v. United States*, 274 U.S. 215, 47 S. Ct. 581, 71 L. Ed. 1006 (1926); *Jacobs v. United States*, 290 U.S. 13, 17, 78 L. Ed. 142, 144 (1933); *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 123, 68 L. Ed. 934, 941, 44 S. Ct. 471 (1924); *Phelps v. United States*, 274 U.S. 341, 344, 71 L. Ed. 1083, 1085, 47 S. Ct. 611 (1927); *Shoshone Tribe v. United States*, 299 U.S. 476, 496-497, 81 L. Ed. 360, 369, 57 S. Ct. 244 (1937); *United States v. Klamath and Moadoc Tribes*, 304 U.S. 119, 123-124, 82 L. Ed. 1219, 1223, 58 S. Ct. 799 (1937); *United States v. Benedict*, 261 U.S. 394, 67 L. Ed. 662, 43 S. Ct. 357 (1923). This requirement has been codified in Section 258A, Title 40, U.S.C. wherein the rate of interest is set at 6% per annum.

[42] *United States v. Dow*, 357 U.S. 17, 20-21, 2 L. Ed. 2d 1109, 1113, 78 S. Ct. 1039 (1958).

to the Dock Board;[43] and

2.) under the law of Louisiana, a vendor's lien or privilege is not a fee interest in property but only a preference created by law in favor of a vendor of property entitling him to payment with preference out of the proceeds of property.[44]

The District Court stated directly that the Government, by virtue of its "vendor's lien", was an "owner" entitled to participate " * * * in the award of $14,322,-234.00 * * * " or fair market value.[45] Apparently the Court of Appeals could not accept the "ownership" theory but could only hold that the Government was an "interested party" and the District Court was authorized to award the Government the amount still owed, yet, stated that such "award" could be made from the "fair market valuation"—not from the award of just compensation.[46] No authority in support of this ruling is cited by the Court of Appeals, for, indeed, such authority would be in direct conflict with:

a.) the decisions of this Court that just compensation required by the Fifth Amendment is not mere valuation, but valuation plus interest; and

b.) the decisions of this Court that the ow of property is the person entitled to just compensation. The mortgagee, lienor, or other creditor secured by the property condemned may assert a claim and be entitled to payment of his claim (in principal, interest and costs, cf. federal tax liens) but he is not an owner, and is not

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[43] During a pre-trial conference, the Government recognized that ownership of the property vested in the Dock Board. See R172-5, 180-1.

[44] La. Civ. Code, Articles 3186, 3249, *infra*, Appendix D.

[45] R. 669.

[46] *Infra*, p. A23.

entitled to compensation; and such payment to a secured creditor is made from the total award of valuation plus interest,[47] not from a mystical "award of fair market value."

The effect of the decisions of the lower Courts is that the Government is entitled to payment as of the date of taking or, to put it otherwise, entitled, in effect, to have six per cent per annum interest on its indebtedness when the act of sale by it to the Dock Board provided that there should be no interest. In addition, the decision of the lower courts has these two effects:

1) The Government is paid in 1952 the amount of the indebtedness due it, whereas, the debt did not mature until 1962; or, in effect, the Government received six per cent per annum interest on the indebtedness when it was entitled to no interest;

2) Whereas, this Court has declared that the compensation must be "the full and perfect equivalent of the property taken",[48] the Dock Board does not receive the full and perfect equivalent of the property taken because it receives interest only on fair market value less an indebtedness liquidated before its time.

Under the law, the Dock Board was entitled either to the use of its property, or, being immediately deprived of the use of the property, it was entitled to interest on the full value of that property up to the date of payment (and certainly not before the date of maturity of the obligation). If the holder of the obligation had been a third

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[47] See for example *United States v. Certain Land in Patterson, N. J.*, 322 F. 2d 866, 871 (3 Cir., 1963); *Swanson v. United States*, 156 F. 2d 442, 448 (9 Cir. 1946).

[48] *Seaboard Airline Railway Co. v. U. S.*, 261 U.S. 299, 304, 306, 43 S. Ct. 354, 356, 67 L. Ed. 664 (1923).

person other than the condemnor, certainly the third person could not have claimed the payment of the indebtedness, until the Dock Board itself was paid or if the indebtedness in favor of the third person had borne interest, say at 4%, the holder of this obligation certainly could not have claimed six per cent interest. The District Court and the Court of Appeals have allowed the proper result to be obscured by the fact that the condemnor was the holder of the condemnee's obligation.

As stated before, this question is of great importance because of the extent of the Government's interest in private property via security devices and in particular tax liens. The District Court and the Court of Appeals both erred in allowing a reduction of "fair market value" by an amount secured by a "vendor's lien" (actually a "vendor's privilege" which entails a right to preference in payment out of proceeds and is not an element of ownership in the property itself), and in effect awarding to the Government six per cent per annum interest on an obligation as to which it was stipulated that there should be no interest.

CONCLUSION

As demonstrated above, this case presents these reasons for granting a writ of certiorari, (this Court's Rule 19(b)):

(a) This Court should supervise a Court of Appeals which has nullified a fixed rule of law limiting its review, and, thus, has departed from the accepted and usual course of judicial proceedings;

(b) This Court should settle important questions to which the Court of Appeals has given answers in conflict with its own decisions, with the decisions of other Courts

of Appeals, with applicable state laws, and with decisions of this Court; and

(c) It is necessary that this Court again "write on a clean slate against a background of contrariety of views among the Circuits", (*United States v. Merz* and *2,872.88 Acres, etc. v. U. S., supra*, p. 13), and establish "guide lines" for the Courts of Appeals for uniform use in considering the reports of Commissions and the District Courts' judgments adopting such reports, just as this Court has established "guide lines" for Commissions and District Courts in the matter of the District Court properly instructing the Commission on matters of law and of the Commission properly conducting hearings, filing the proper kind of report, etc.

Petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals, Fifth Circuit.

Respectfully submitted,

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